LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 29 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 332

LOUIS GLADSTEIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TERRY MILBURN
Attorney for Petitioner
149 West 72nd Street
New York, New York 10023

BOBICK & DEUTSCH
Of Counsel
149 West 72nd Street
New York, New York 10023

TABLE OF CONTENTS

	PAGE
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
POINT I—The action of the government in indicting and trying the petitioner for conspiracy and the substantive crime of receiving stolen goods constituted bad faith inasmuch as the government was aware that the conspiracy charge was baseless and without legal foundation	6
POINT II—The hearsay evidence admitted in connection with the conspiracy count of the indictment in addition to other damaging hearsay testimony was so voluminous as to render it impossible for the court to eradicate its prejudicial effect from the minds of the jury by limiting instructions, thus depriving the petitioner of a fair trial	6
CONCLUSIONS	10
APPENDICES:	
A. Opinion of the Court of Appeals	13
B. Title 18 U. S. Code, Section 2	30
C. Title 18 U. S. Code, Section 371	31
D. Title 18 U. S. Code, Section 659	32

TABLE OF AUTHORITIES

PAGE

Cases:

Fiswick v. United States, 329 U. S. 211, —— S. Ct., —— L. Ed. —— 8

Glasser v. United States, 315 U. S. 60, —— S. Ct. ——, —— L. Ed. —— 8

Krulewitch v. United States, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790 9, 10

United States v. DeFillo, 2 Cir. 1958, 257 F. 2d 835 7

United States v. Manfredi, 2 Cir. 1960, 275 F. 2d 588, cert. denied, 363 U. S. 828, 80 S. Ct. 1598, —— L. Ed. 2d —— 7

United States v. Schaffer, 2 Cir. 1959, 266 F. 2d 435 7

IN THE

Supreme Court of the United States

October Term, 1964

No. .....

LOUIS GLADSTEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of of the Supreme Court of the United States:

Petitioner, Louis Gladstein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 7, 1964.

Citations to Opinions Below

There was no opinion in the District Court. The opinion of the Court of Appeals is printed in Appendix A and is not officially reported at this time.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 7, 1964. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254(I).

Questions Presented

1. Whether or not, the petitioner was so prejudiced by the introduction of voluminous hearsay testimony and the failure of the District Judge to adequately remove said evidence from the consideration of the jury as to constitute a violation of the petitioner's right to a fair trial and deprive the petitioner of due process of law?

2. Whether or not, in view of the evidence presented, the conspiracy count of the indictment was obtained by the United States Attorney merely so that hearsay evidence otherwise inadmissible could be presented to the jury; and if this procedure constituted bad faith on the part of the government thus adversely affecting substantial constitutional rights of the petitioner?

Statutes Involved

1. Title 18 United States Code, Section 371.

2. Title 18 United States Code, Section 659.

3. Title 18 United States Code, Section 2.

The text of the Statute and Rule are printed *infra* in Appendices B, C and D.

Statement

On June 22, 1962, the petitioner, Louis Gladstein, was indicted for the substantive crime of violating Title 18 United States Code, Section 659. The indictment also charged the petitioner with conspiracy to commit the crimes set forth in the aforementioned statute. The case was tried between August 20, 1963 and August 23, 1963, before the Hon. Thomas J. Murphy, District Judge, and a jury.

The main thrust of the government's attack was directed towards the charge of conspiracy. It was the government's contention that various conversations and actions which took place between the defendants and the petitioner, formed the basis of a conspiracy to violate the laws of the United States. The alleged scheme as presented by the government was as follows:

Pitts and Manin were to go to Albany, New York from New York City to obtain a truckload of dresses. They were to get a truck from the petitioner, and return the dresses

to Elgisser who would supposedly pay for them. It was the government's further contention that certain statements by Elgisser, in which he stated he would take anything that they could get, established the interstate nature of the conspiracy.

After presenting its entire case, 75% to 80% of which consisted of testimony by Pitts and Cogdell and related to the conspiracy, the trial court granted the defense motion dismiss the conspiracy count on the grounds that the government failed to prove a *prima facie* case. Thus, the major portion of the evidence presented by the government which was subject to connection and allowed into evidence as relating to the conspiracy parts of the indictment, was rendered inadmissible as being hearsay evidence.

Thereafter, the defense requested that the court give specific limiting instructions to the jury in regard to the hearsay testimony. The defense contended that since the hearsay was so voluminous, nothing less than specific instructions regarding specific portions of evidence would be sufficient.

At this point the defense rested, both sides summed up and the case went to the jury. The petitioner was found guilty of violating the substantive count of the indictment.

Reasons for Granting the Writ

The government, on the basis of two flimsy statements which when read out of context may be interpreted in almost any manner, indicted and tried a man on conspiracy to commit a federal crime. This was done with full knowledge on the part of the government, that all the acts testified to showed a conspiracy took place within the borders of New York State and at no time was there even a hint that the nature of the act could ever be interstate thus involving the federal government. It seems ludicrous, to say the least, that the government could cause a conspiracy count to be placed in an indictment solely with this type of evidence as a basis. Yet, to draw any other conclusion shocks one's sense of fair play and justice.

One is led to the inescapable conclusion that the government, although fully aware of all the circumstances, asked for a conspiracy indictment so that evidence otherwise inadmissible could be placed before the jury at trial.

The government was fully aware of the fact that the major portion of its evidence was hearsay and could only be admitted subject to proving a *prima facie* conspiracy. The government was also aware of the practicalities involved in the court giving so called "limiting instructions" and knew that the jury could not possibly disregard all it heard. This is especially true when the majority of the case consisted of hearsay testimony. The government also knew that the *prima facie* case of conspiracy could not be proved. Thus, it used the charge of conspiracy as a device to put before the jury evidence that would so prejudice the minds of the jurors, especially by its volume, that they

could not fail to convict the petitioner herein of the substantive charge in the indictment.

It is respectfully submitted that the procedure of the government which in effect has been sanctioned by the District Court and the Court of Appeals, Second Circuit, has deprived the petitioner of his constitutional rights to a fair and impartial trial and due process of law.

It cannot be disputed that criminal conspiracy forms the basis for a vast amount of prosecution in the Federal Court system. Furthermore, no precedent need be cited here for the proposition that the Supreme Court of the United States has time and again upheld the validity of these cases. However, situations such as the one in this petition cannot be tolerated.

POINT I

The action of the government in indicting and trying the petitioner for conspiracy and the substantive crime of receiving stolen goods constituted bad faith inasmuch as the government was aware that the conspiracy charge was baseless and without legal foundation.

Inasmuch as there is no rule that requires that each defendant in a criminal prosecution be afforded a separate trial, the defendant must rely upon two safeguards to protect him against guilt by association. The first is that the trial court give proper limiting instructions. The second is that the government, especially where the crime of conspiracy is involved, moves for the joint indictment and trial in good faith. If both these safeguards are followed,

then as pointed out in *United States* v. *DeFillo*, 2 Cir. 1958, 257 F. 2d 835, 839:

> "It is fundamental to the jury system that they will be presumed to follow the court's charge and to limit their consideration to the evidence which may be properly applied against each defendant when more than one defendant is on trial. Delli Paoli v. United States, 352 U. S. 232, 239-241, 77 S. Ct. 294, 1 L. Ed. 2d 278; United States v. Falcone, 2 Cir. 1940, 109 F. 2d 579, 582 affirmed on other grounds, 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 128."

In the case at bar, it appears obvious that the government has resorted to the quite devious tactic of using the conspiracy portion of the indictment and trial to obtain a result that might be characterized as a "vicarious" conviction. That is, although the government was well aware of the fact that it could not possibly prove the conspiracy, it felt that the evidence in regard to the conspiracy was essential to obtain a conviction on the substantive crime.

The Circuit Court of Appeals, Second Circuit, by Medina, J., has held that the limiting instructions given by the court are adequate to safeguard the rights of a defendant when there is a just trial:

> "In the absence of bad faith on the part of the government in bringing the conspiracy count, 'or some special circumstances of an extraordinary and unusual character'." United States v. Manfredi, 275 F. 2d 588, 593, 2 Cir. 1960, cert. denied 363 U. S. 828, 80 S. Ct. 1598, —— L. Ed. —— (1960); United States v. Schaffer, 266 F. 2d 435, 443, 2 Cir. 1959.

It is the petitioner's contention, that this Court would be hard pressed to find a better case to exemplify the "bad

faith" referred to by Judge Medina than the case at bar. The fact is that "bad faith" is too mild a term to describe the government's action. Nothing less than an authoritative opinion by the Supreme Court of the United States will place said official conduct in its proper perspective.

POINT II

The hearsay evidence admitted in connection with the conspiracy count of the indictment in addition to other damaging hearsay testimony was so voluminous as to render it impossible for the court to eradicate its prejudicial effect from the minds of the jury by limiting instructions, thus depriving the petitioner of a fair trial.

The petitioner herein was charged with conspiracy to violate a federal law. The reason ultimately advanced for such charge is that one of the alleged co-conspirators had made two statements which the government relied upon to show the conspiracy. (See the government's Memorandum of Law submitted at the end of its case.)

After the defense moved to dismiss the conspiracy count on the ground that the government failed to prove a *prima facie* case, and after hearing argument on both sides, the court granted said motion. The question then arose as to what the court should do about the large amount of testimony that now had to be excluded from the consideration of the jury. See *Fiswick* v. *United States*, 329 U. S. 211, —— S. Ct. ——, —— L. Ed. ——; and *Glasser* v. *United States*, 315 U. S. 60, —— S. Ct. ——, —— L. Ed. ——.

The petitioner now contends that although the trial court attempted to withdraw the aforementioned evidence

from the consideration of the jury, it was an impossible task. The damage had been done and the petitioner had been irreparably prejudiced.

Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 445-458, 69 S. Ct. 716, 723, 93 L. Ed. 790, put it well when he stated:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter the accused is often confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. *In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.* (Emphasis supplied.) The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U. S. 539, 559, all practicing lawyers know it to be unmitigated fiction. See Skidmore v. Baltimore and Ohio R. Co., 167 F. 2d 54."

In further taking to task the system of conspiracy trials, Justice Jackson stated in *Krulewitch* v. *United States*, *supra*:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of the jurors who are ready to believe that

> birds of a feather are flocked together. If he is silent, he is taken to admit it, and if, as often happens co-defendants can be prodded into accusing or contradicting each other, they convict each other * * *."

These words could not have found a better example than that of the instant case. This is so, for in addition to the tremendous volume of testimony dealing with the conspiracy, the government introduced evidence dealing with confessions of co-defendants. The most damaging statement was that of Max Manny Elgisser.

While it is true that the trial court attempted to give limiting instructions to the jury, it is beyond comprehension how jurors, even with such instructions, could disregard the fact that 80% of this inadmissible evidence pointed the finger of guilt at the petitioner.

Conclusions

Whereas this case could not be considered a "mass conspiracy trial," the same evils attributed to this type of trial were present during the four days that it took to dispose of the instant case. This is compounded by the fact that the government knew that the conspiracy portion of the indictment was baseless.

Now is the time for this learned court to speak out against such injustice. It is time that they placed the person accused of conspiracy on an equal plane with the accusor and recognize that the act of giving limiting instructions to the jury cannot atone for the damage and prejudice which has already been done to the person accused of this heinous crime.

In view of the foregoing it is prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

TERRY MILBURN
Attorney for Petitioner
149 West 72nd Street
New York, New York 10023

BOBICK & DEUTSCH
Of Counsel
149 West 72nd Street
New York, New York 10023